IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

MICHAEL J. KELLY, PRESIDING

G.C. TIMMIS & COMPANY,

Plaintiff-Appellant,

-vs- Supreme Court Case No. 120035

GUARDIAN ALARM COMPANY,

Defendant-Appellee.
_____/

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BRIEF ON APPEAL - APPELLEE

Dated: November 4, 2002

2002BMRnmh(4569)=Q:\G009238\B-APPEAL.SUP=1031

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TABLE OF CONTENTS

BESS AND SERLIN
PROFESSIONAL CORPORATION
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SOUTHFIELD, MICHIGAN 48075-1195
(248) 353-7620

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INDEX OF AUTHORITIES

Cases **Page**

BESS AND SERLIN
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SOUTHFIELD, MICHIGAN 48075-1195
(248) 353-7620

Cases **Page**

Statutes

Court Rules

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JURISDICTIONAL SUMMARY

On July 2, 2002, pursuant to MCR 7.301(A)(2), the Supreme Court granted the application for leave to appeal from the August 24, 2001 decision of the Court of Appeals (33a).

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COUNTER- STATEMENT OF QUESTION PRESENTED FOR REVIEW

I. WAS DEFENDANT-APPELLEE ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE NO ISSUE OF FACT EXISTED AS TO WHETHER AN INVESTMENT BANKER, HAVING ADMITTEDLY NEGOTIATED ON BEHALF OF HIS CLIENT FOR THE PURCHASE OF BUSINESS ASSETS PURSUANT TO AN ALLEGED AGREEMENT THAT REQUIRED THE INVESTMENT BANKER TO MAKE CONTACT WITH THE SELLER ON BEHALF OF HIS CLIENT, WAS REQUIRED TO BE LICENSED UNDER THE REAL ESTATE BROKERS LICENSING ACT IN ORDER TO MAINTAIN AN ACTION FOR COMPENSATION FOR THE PERFORMANCE OF THE AGREEMENT?

Defendant-Appellee says "Yes".

Plaintiff-Appellant says "No".

The trial court said "No".

The Court of Appeals said "Yes".

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SUMMARY OF ARGUMENT

Plaintiff-Appellant G.C. Timmis & Company ("Timmis") allegedly entered into a contract with Defendant-Appellee Guardian Alarm Company ("Guardian") that would pay Timmis a "success fee" if Guardian acquired a business that Timmis had contacted.

Timmis' attorney wrote a letter to Guardian demanding payment of the success fee because Timmis had represented Guardian in negotiations to acquire a business that Guardian ultimately acquired.

The Real Estate Brokers Licensing Act, MCLA 339.2501 et seq., requires a person that negotiates for the purchase or sale of a business to be licensed as a real estate broker.

Timmis claims that it does not have to be licensed as a real estate broker because it was providing investment banking services.

Timmis' alleged contract makes no mention of providing investment banking services to Guardian and compensation is based solely on the identification of and contact with the acquired business.

The Real Estate Brokers Licensing Act is construed broadly to effectuate its purpose and included in the definition of "real estate broker" is a person who finds a buyer or seller of a business.

Even if Timmis was also providing investment banking services to Guardian, the alleged agreement cannot be bifurcated into legal and illegal sections in order to enforce the section that did not require a license.

Timmis failed to raise an issue of fact as to whether it negotiated for the purchase of a business, since Timmis' affidavit was defective as to form and content, and failed to deny that

Timmis had negotiated for the purchase of the business, in the face of the admission contained in the demand letter.

The legislature did not exempt investment bankers from the requirements of the Real Estate Brokers Licensing Act.

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COUNTER-STATEMENT OF MATERIAL FACTS

AND PROCEEDINGS

a. Factual Statement

The following facts were argued to the trial court on Defendant-Appellee Guardian Alarm Company's (hereinafter referred to as "Guardian") Motion for Summary Disposition. They are supported by references to the pleadings and the exhibits which were filed in support of and in opposition to the motion. Although subsequent discovery has resulted in further factual development and support for the motion, Guardian is not relying on testimony or exhibits discovered subsequent to the argument on the motion.

Guardian is one of Michigan's leading providers of home and commercial security systems. As a means of increasing its market share, Guardian will frequently purchase other security companies or their assets to obtain their customer accounts.

Plaintiff-Appellant G.C. Timmis & Company (hereinafter referred to as "Timmis") is an investment banker (36a). Timmis is licensed as a registered broker-dealer and a registered investment advisor by the state of Michigan (35a). Timmis received its license as an investment advisor in December, 1995. Timmis is not a registered investment banker because the state of Michigan does not issue registrations for "investment bankers".

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Timmis provides a wide range of services to its clients. These services are described in a brochure that Timmis attached as an exhibit to its affidavit[1] filed in support of its Response to Defendant's Motion for Summary Disposition (42a-52a).

As can be seen from the brochure, Timmis provides "Buy-Side Merger Advisory Services" to its clients as one facet of its investment banking services (46a). These services include assisting the client in acquiring other businesses (46a). Timmis' brochure lists a number of representative transactions in which Timmis "negotiated" the acquisition of a business (49a - 51a). Timmis even boasts that it initiated the transaction that is the subject matter of this lawsuit (48a). The brochure also confirms that The Rao Group, the target of the acquisition in question, was also a client of Timmis (51a).

According to Timmis' affidavit, Timmis solicited Guardian by letter on October 25, 1995 to offer investment banking services in the field of mergers and acquisitions (36a; 41a). Eventually, Timmis, through its principal, Gerald C. Timmis, met with Mr. Milton Pierce of Guardian on two occasions (36a - 38a).

According to Timmis' affidavit, a verbal agreement was reached with Milton Pierce (38a). The terms of that alleged agreement are described only in that affidavit. The agreement specified that a success fee would be paid on any target that Timmis contacted on Guardian's behalf that was eventually acquired by Guardian (38a, ¶26). The success fee was based on a percentage of the purchase price paid with a minimum fee payable of $100,000.00 (38a; ¶27). The agreement also

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[1]In actuality, what Timmis filed is not even an affidavit as is demonstrated in Section (e) of the Argument.

provided that if Guardian acquired the target within two years from the date of the termination of the agreement, then Timmis would still be entitled to its fee (38a; ¶28).

Guardian has denied it ever entered into any agreement with Timmis for the furnishing of investment banking services. It is undisputed that after the date of the alleged agreement, Timmis never again personally met with Guardian to provide investment banking services of any kind, although Timmis alleges he conducted several telephone calls with Guardian (38a).

The target company discussed was MetroCell Security (38a). MetroCell was owned by The Rao Group, which was one of Timmis' clients (51a). On behalf of Guardian, Timmis engaged in direct negotiations with The Rao Group for the purchase of MetroCell Security over several weeks. This fact was admitted by Timmis' attorney in a letter dated February 26, 1997, which was attached to the Motion for Summary Disposition as Exhibit A (78a-79a). Timmis has never denied under oath that he discussed a purchase price for the sale of MetroCell Security to Guardian during his meetings with Duane Rao of The Rao Group.

Although Guardian never reached an agreement for any specific compensation to be paid to Timmis, Guardian does not dispute that Timmis negotiated with Duane Rao to acquire MetroCell Security for Guardian. Nevertheless, Timmis' efforts were unsuccessful (39a, ¶32).

Several months after Timmis ceased its efforts, Duane Rao contacted Guardian directly and engaged in new negotiations with Guardian for the acquisition of MetroCell Security. Timmis was not involved in those negotiations. Rao agreed to sell MetroCell Security to Guardian (39a). Several months later, Timmis made a demand for payment from Guardian under the alleged verbal agreement (78a). When Guardian refused to pay the demand, Timmis filed its lawsuit.

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b. Material Proceedings

Guardian filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(7), (8) and (10). Guardian contended that Timmis was seeking compensation for, in part, negotiating the successful acquisition of a business opportunity on behalf of Guardian. Guardian argued that such activity by Timmis required a real estate broker's license under the Real Estate Brokers Licensing Act, MCLA 339.2501 et seq ("the Act"). Since Timmis was not a licensed real estate broker, nor had alleged that it had such a license, it was barred from seeking compensation for its activities under the Act. MCLA 339.2512a.

Timmis responded by claiming the services it provided were investment banking services. Without denying it had negotiated with The Rao Group on Guardian's behalf, Timmis claimed investment banking services are not subject to the requirements of the Act pursuant to the decision in Turner Holdings, Inc v Howard Miller Clock Co, 657 F Supp 1370 (WD Mich, 1987).

At the hearing on the motion, the trial court agreed with Timmis that if it was providing investment banking services to Guardian, it was not subject to the requirements of the Act (16a). The trial court adopted the rationale of Turner Holdings, but held that an issue of fact still existed as to whether the services provided by Timmis were investment banking services (16a). On that basis, Guardian's Motion for Summary Disposition was denied on March 26, 1998 (20a).

Guardian filed a timely Application for Leave to Appeal from the Order Denying Defendant's Motion for Summary Disposition. On September 28, 1998, the Court of Appeals granted the application (22a).

On August 24, 2001, the Court of Appeals issued its Opinion reversing the Order Denying Motion for Summary Disposition and remanding the matter back to the trial court for entry of an order dismissing the First Amended Complaint (23a-32a).

Timmis filed a timely application for leave to appeal from the decision of the Court of Appeals. On July 2, 2002, this Court entered its order granting Timmis' application (33a).

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ARGUMENT

DEFENDANT-APPELLEE GUARDIAN ALARM COMPANY WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE NO ISSUE OF FACT EXISTED AS TO WHETHER AN INVESTMENT BANKER, HAVING ADMITTEDLY NEGOTIATED ON BEHALF OF GUARDIAN ALARM COMPANY FOR THE PURCHASE OF BUSINESS ASSETS, PURSUANT TO AN ALLEGED AGREEMENT THAT REQUIRED THE INVESTMENT BANKER TO MAKE CONTACT WITH THE SELLER ON BEHALF OF GUARDIAN ALARM COMPANY, WAS REQUIRED TO BE LICENSED UNDER THE REAL ESTATE BROKERS LICENSING ACT IN ORDER TO MAINTAIN AN ACTION FOR COMPENSATION UNDER THAT AGREEMENT.

a. Standard of Review

The Court of Appeals reviewed the motion as if it had been considered by the trial court under MCR 2.116(C)(10) because the trial court considered documentary evidence in concluding that a genuine issue of material fact existed (25a). Timmis does not dispute that the Court of Appeals utilized the appropriate standard of review.

This Court has recently clarified the standard to be applied in reviewing motions brought under MCR 2.116(C)(10). In Smith v Globe Life Insurance Co, 460 Mich 446; 597 NW2d 28 (1999), this Court stated as follows:

> A motion for summary disposition under MCR 2.116(C)(10), which tests the factual support of a claim is subject to de novo review.
>
> * * * * * * *
>
> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant

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> a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
>
> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. Id at 454-455.

The standard of review cited by the Court of Appeals in its opinion is consistent with the foregoing. Spiek v Department of Transportation, 456 Mich 331, 337; 572 NW2d 201 (1998) (25a).

In addition, the Court of Appeals cited long-accepted standards of statutory construction, which are repeated in Appellant's Brief (25a). Although the Court of Appeals did not actually engage in statutory construction because it applied the plain and ordinary meaning of the Act, Guardian agrees that the principles set forth in the opinion are a correct statement of the law (25a).

b. Any person who negotiates the purchase or sale of a business or business opportunity is a "real estate broker" under the Real Estate Brokers Licensing Act.

The Court of Appeals conducted a proper and logical analysis of the issue presented by Guardian's appeal. Guardian had argued that Timmis was acting as a real estate broker when Timmis contacted The Rao Group on Guardian's behalf and engaged in discussions over the price to be paid for MetroCell Security (78a). If Timmis was acting as a real estate broker, then it was

required to be licensed in order to maintain an action in court for the collection of compensation. MCLA 339.2512a states as follows:

> A person engaged in the business of, or **acting in the capacity of, a person required to be licensed** under this article, shall not maintain an action in a court of this state for the collection of compensation **for the performance of an act or contract for which a license is required** by this article without alleging and proving that the person was licensed under this article at the time of the performance of the act or contract. (Emphasis supplied).

The statutory bar prohibiting unlicensed brokers from proceeding in court is clear and unambiguous and is not disputed by Timmis. Therefore, the Court of Appeals surmised that the dispositive question was whether Timmis was acting as a "real estate broker" as defined by the Act (26a).

The Real Estate Brokers Licensing Act is not limited to purchases or sales of real estate. Ever since the statute was enacted in 1919, it has regulated the licensing of persons that bought and sold businesses, business opportunities, and business goodwill. 1919 PA 306. Although the statute has gone through several amendments, it has steadfastly required the licensing of persons that buy and sell businesses for others.

The scope of the act is set forth in its definition of a "real estate broker":

> (d) "Real estate broker" means an individual, sole proprietorship, partnership, association, **corporation**, common law trust, or a combination of those entities **who with intent to collect or receive a fee, compensation, or valuable consideration**, sells or offers for sale, buys or offers to buy, provides or offers to provide market analyses, lists or offers or attempts to list, or negotiates the purchase or sale or exchange or mortgage of real estate, or negotiates for the construction of a building on real estate; who leases or offers or rents or offers for rent real estate or the improvements on the real estate for others, as a whole or partial vocation; who engages in property

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> management as a whole or partial vocation; who sells or offers for sale, buys or offers to buy, leases or offers to lease, or **negotiates the purchase or sale or exchange of a business, business opportunity, or the goodwill of an existing business for others**; or who, as owner or otherwise, engages in the sale of real estate as a principal vocation. (Emphasis added). MCLA 339.2501(d).

Despite the emphasis on real estate, the statute continues to apply to transactions involving businesses.

In Cardillo v Canusa Extrusion Engineering, Inc, 145 Mich App 361; 377 NW2d 412 (1985), the Court of Appeals expressly held that the statute was *not* limited to real estate, but extended to businesses as well:

> Regarding the character of the property covered by the statutory licensing requirement, it is clear that the statute is *not* limited to real estate, but extends also to businesses, which are essentially in the nature of personal property. In this connection, it should be noted that while, in the within case, leases of real estate were included in the transaction, we need not and do not rest our decision on that fact. **Applied to the within case, we are satisfied that included within the words "business, business opportunity or the good will of an existing business", as used in the statute, is the sale of the assets. We believe that sale of the assets of this engineering company, which included machinery and equipment, is squarely within the statutory meaning of a "business"**. (Emphasis added). Id at 368-369.

Thus, the Court expressly held that to find a purchaser of a business for a commission is within the statutory definition of a broker. Id at 368.

c. Negotiating for the purchase or sale of a business under the Real Estate Brokers Licensing Act includes finding a purchaser or seller.

In Cardillo, the plaintiff had entered into an oral agreement with the defendant to find a buyer for its business assets. The oral agreement provided that plaintiff would receive a fee based on a

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percentage of the purchase price. The defendant ultimately sold its assets to a person identified by the plaintiff. However, the defendant refused to pay the agreed-upon fee. The trial court had decided a person who does nothing more than find a buyer does not fall within the definition of a "real estate broker". Id at 365.

On appeal, the Court held as follows:

> Under Michigan law, a party who brings suit to recover a brokerage fee must allege that he is a licensed real estate broker. Thus, if plaintiffs come within the statutory definition of real estate broker, they cannot recover the commission or finder's fee they sought in the trial court.
>
> * * * * * * * * * * *
>
> In application of the licensing provisions to a particular fact situation, we look to both the nature of the activities performed and the character of the property involved. **One important part of a broker's function is to find a purchaser. To negotiate a purchase or sale connotes a wider, different function than merely to find a purchaser or seller**. The statutes contemplate that normally brokers will engage in various activities. But, the statute uses the word "or", not the word "and". Thus, in general, it is unnecessary that in a particular transaction a person perform all functions that are the usual business of a broker. **Sometimes, performing one of the usual functions, such as finding a purchaser, will be enough to subject a person to the broker licensing requirement**.
>
> * * * * * * * * *
>
> **Under this analysis, we would hold that in finding a purchaser for defendants' assets under a commission agreement, plaintiffs were subject to the real estate brokers licensing statute and, lacking such a license, plaintiffs' suit for compensation must fail.** We believe this represents both the correct interpretation of the Michigan real estate brokers licensing statute and the majority view concerning this issue. In so holding, we recognize the existence of a minority view, but are not persuaded it should be adopted in Michigan. (Footnotes omitted). (Emphasis added.) Id at 365-371.

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Cardillo's analysis was heavily influenced by two earlier decisions of this Court. In Smith v Starke, 196 Mich 311; 162 NW 998 (1917), the plaintiff, a farmer, agreed to furnish names of potential purchasers of farm property, to a real estate broker, in return for a portion of the broker's commission. The alleged agreement was verbal, and the issue was whether such an agreement was barred by the statute of frauds.[2]

This Court stated as follows:

> The services to be performed and contemplated by the arrangement between the plaintiff and defendant were the services usually performed by a real estate broker, those of procuring, or aiding in procuring, a purchaser of the Blowers farm; that plaintiff was not to perform all the functions of a dealer in real estate does not preclude from characterizing the services performed as those usually performed by a real estate broker. **Indeed the services to be performed by plaintiff were of the very essence of brokerage services, viz., procuring a purchaser of another's property**. Id at 313-314 (Emphasis supplied).

Thus, this Court held that the agreement contemplated the payment of a real estate commission and was void under the statute of frauds. Id at 315.

In Krause v Boraks, 341 Mich 149; 67 NW2d 202 (1954), this Court decided whether an attorney who procured a purchaser of real estate could enforce an oral agreement to share the commission with the broker. The real estate brokers licensing statute was at issue as well as the statute of frauds. The attorney claimed that the agreement was not for the payment of a commission, but strictly for acting as a procurer or finder. This Court did not accept the attorney's distinction of terms:

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[2]Every agreement, promise or contract to pay any commission for or upon the sale of any interest in real estate. 3 Comp Law 1915, §11981.

> The trial judge concluded that the transaction was "not an agreement for payment of a commission on the sale of real estate", that plaintiff "was employed in another capacity entirely, and that was to secure somebody that would be able to produce money so that this deal could be consummated."
>
> Neither niceties of language nor fanciful designations can change the substance of the transaction. There can be no doubt about the proposition that the procurement for another, for compensation, of the sale of a vendor's interest in a land contract is controlled by the so-called brokers' licensing act. (PA 1919, No. 306, as amended.) Id at 153.

Even though the activities of the attorney were limited to the procurement of the purchaser, this Court had no difficulty in holding that the activity fell within the Act, notwithstanding the absence of any evidence that the attorney engaged in "negotiations". It was enough that the substance of the activities was controlled by the Act. Id at 155.

Relying on this Court's opinions in Smith and Krause, the Court of Appeals in Cardillo concluded that the act of finding a purchaser or seller fell within the statutory definition of a real estate broker, even if the finder did nothing more to procure the transaction. 145 Mich App at 371. -Cardillo represents the majority viewpoint on this issue and is based on sound principles of statutory construction utilized by other courts to reach the same conclusion.

In Alford v Raschiatore, 163 Pa Super 635; 63 A 2d 366 (1949), the Superior Court of Pennsylvania addressed the issue with regard to an oral agreement to find a purchaser of a restaurant. Pennsylvania's real estate broker's licensing act defined a real estate broker as a person who "shall

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negotiate the sale. . . or shall offer or attempt to negotiate the sale. . .of any real estate.[3] The plaintiff, who was not licensed, denied he had negotiated for the purchase.

The Court stated as follows:

> "The common knowledge on the subject" of which the Court must take judicial notice, is that in probably the bulk of real estate transactions conducted by real estate agents or brokers, the agent's part amounts to little more than finding and introducing to a party who is ready and willing to sell, a prospect who is ready, willing and able to buy.
>
> **We cannot give to the word "negotiate", in the sense intended by the Legislature, the strict construction contended for by appellee. If we should so do, it would preclude from the regulatory purpose of the Act a great percentage of brokers and salesmen who normally do no more than acquire prospective buyers and sellers with the location and price of available property, and who annually comply with the licensing feature of the Act in the belief that they are covered by it.**
>
> In giving the word "negotiate" a broad interpretation, we are in accord with the courts in sister states which have construed similar real estate brokers license acts. In Baird v. Krancer, 138 Misc. 360, 246 N. Y. S. 85, recovery was denied to the plaintiff who sought to avoid the provisions of the real estate property law requiring licensing to recover real estate broker commissions. The Court said (page 88 of 246 N. Y. S.):
>
> > The essential feature of a broker's employment is to bring the parties together in an amicable frame of mind, with an attitude toward each other and toward the transaction in hand which permits their working out the terms of their agreement. They may reach that agreement without his aid or interference. Indeed, in a transaction of any magnitude, the terms would never be settled beforehand or negotiated finally by the broker. . .

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[3]P.L. 1216, 63 PS 431 (1929).

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> This does not mean that the broker has not negotiated the transaction. . . If the statute does not apply to such a situation, then it is a toothless enactment. Every unlicensed broker will make the same argument that the plaintiff here has made, that he did not have to bring the parties to actual agreement upon all the details, that that phase was something for the parties themselves to determine. In short, every unlicensed broker will be enabled to carry on his business just as he did before the statute came into existence, simply by calling himself a finder, an originator, an introducer, instead of a broker. This would be an absurd limitation of the statute and one unfounded in reason or policy. **A broker "negotiates" just as much when he brings parties together in such frame of mind that they can by themselves evolve a plan of procedure, as when he himself carries on the discussion and personally induces an agreement to accept a specific provision**. (Emphasis added). Id at 368.

The Superior Court's rationale has been adopted by the Supreme Courts in several other states. Certified Realty Co v Reddick, 253 Ore 617; 456 P2d 502 (1969) (applying Washington law); Broughall v Black Forest Development Co, 196 Colo 503; 593 P2d 314 (1978); Eastern Commercial Realty Corp v Fusco, 654 A2d 833 (Del, 1995).

Particularly persuasive is the opinion of the Supreme Court of New Mexico in Watts v Andrews, 98 NM 404; 649 P2d 472 (1982):

> We hold that a person who simply brings two parties together in a real estate transaction must be licensed to sue for recovery of a commission. To rule otherwise would be to violate the clear intent of the Legislature in requiring that real estate brokers or salespersons be licensed. By requiring licensure, the Legislature intended that the real estate occupation be regulated. See @1-1-2(C), N.M.S.A.1978 (Repl.Pamp.1981). The Legislature intends to protect the public by requiring the New Mexico Real Estate Commission to evaluate the competence and moral character of persons in the real estate business through licensing and examination requirements. @61-29-10, N.M.S.A.1978 (Cum.Supp.1981). The Legislature ensures the furtherance of its purposes by prohibiting unlicensed persons acting as real estate brokers from maintaining an action to recover a commission. Star Realty Company, supra. If we were to permit an

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> unlicensed person who brings two parties together in a real estate transaction to recover a commission, we would in effect render the Real Estate Brokers Act meaningless. See, e.g., Kilbane v. Collins, 56 Ill.App.3d 707, 14 Ill.Dec. 404, 372 N.E.2d 415 (1978); Baird v. Krancer, 138 Misc. 360, 246 N.Y.S. 85 (Sup.Ct.1930).
>
> **When the Legislature defined a "broker" as one who "sells or offers for sale", they, no doubt, intended to encompass within its definition one who simply procures a purchaser; the term "sell" being synonymous with procuring a purchaser. See Schoenfeld v. Silver Moon Springs, Inc., 325 F.Supp. 199 (E.D.Wis.1971). In addition, although a middleman does not negotiate the terms of the agreement, for purposes of licensure, the term "negotiate" also includes one who brings two parties together. See Kilbane v. Dyas, 33 Ill.App.3d 439, 337 N.E.2d 217 (1975); Corson v. Keane, 4 N.J. 221, 72 A.2d 314 (1950).**
>
> We agree with the contention of the Realtors Association of New Mexico, Amicus Curiae, that, while there may be reason to distinguish a middleman from a broker in order to ascertain the duties owed to a buyer or seller, there is no substantial reason to do so in order to ascertain the applicability of the licensing statute. (Emphasis added). Id at 475-476.

In its review of this case, the Court of Appeals below adopted the statutory construction utilized in Cardillo (26a-27a). The Michigan Association of Realtors® argues persuasively in its amicus brief that the plain and ordinary meaning of "negotiate" includes the initial contact and communication as well as the final agreement on terms (Amicus Brief, pp 9-10). Even if Timmis did nothing more than contact Duane Rao for the purpose of initiating discussions between Rao and Guardian, as was required by Timmis' alleged agreement, Timmis would be engaged in negotiations and would be deemed to be a real estate broker.

This Court should adopt the same approach it used in Smith and Krause, and examine Timmis' actions in the overall context of the Act. When Timmis contracted to accept a fee for

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assisting Guardian in finding a business to acquire, it was engaging "in the very essence of brokerage services". 196 Mich at 314. This is the principle that supports the appellate court opinions in this matter and Cardillo, and is the foundation for the opinions discussed herein from the courts of last resort in Pennsylvania, Oregon, Colorado, Delaware and New Mexico.

There is no question that Timmis was, in fact, more than a "finder" or "middleman". The investment banking services it claims to have provided to Guardian were allegedly instrumental in facilitating the sale, as surely as if Timmis had negotiated all of the terms. Although there is no question that Timmis was engaged in "negotiations" with The Rao Group, it is also certain that its role in bringing Guardian and Rao together was contemplated by the legislature in enacting the Act. To the extent that the Court of Appeals in this matter broadly interpreted the scope of the definition of a real estate broker, such an interpretation serves to advance the purpose of the Act, is consistent with the plain and ordinary meaning, and should not be limited to a narrow construction by this Court.

d. There is no issue of fact as to whether Timmis' contract called for the performance of an act requiring a real estate broker's license.

The dissenting opinion in the case below concluded that there was an issue of fact as to whether Timmis was seeking compensation for the performance of an act or contract for which a license is required by the Act. The dissent argued that Timmis was not seeking compensation for negotiating a sale, but for the information and advice it provided to Guardian as an investment banker, as well as for targeting a potential acquisition. The dissent concluded that it had not been established that the contract required Timmis to negotiate the purchase of the business (31a).

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The dissent did not acknowledge that the burden had shifted to Timmis to establish through documentary evidence that a genuine issue of material fact existed and that Timmis could not simply rely on mere allegations or denials. Smith, supra at 454-455. Timmis' affidavit was the only documentary evidence submitted in opposition to Guardian's motion and it is the only evidence that describes the terms of the alleged agreement.

The agreement between Guardian and Timmis is described in the affidavit as follows:

> 26. The agreement between G.C. TIMMIS & COMPANY and GUARDIAN ALARM COMPANY specified that a success fee would be paid on any target that I contacted on GUARDIAN's behalf that was eventually acquired;
>
> 27. The aforementioned fee would be based on the "Lehman Formula", (see Plaintiff's Complaint), with a minimum fee payable of $100,000.00;
>
> 28. It was also agreed that there would be an overhang of two years, which is customary in the industry, specifying that G.C. TIMMIS & COMPANY would remain entitled to a fee if any target were acquired within two years from the date of the termination of the agreement; (38a).

What is notable about Timmis' description of the alleged agreement is the absence of any reference to the furnishing of expert investment banking advice. Timmis' compensation is earned solely by its procurement of a seller. Timmis was to be paid only if Guardian acquired a business that he contacted. There is no provision in the alleged agreement for Timmis to be paid for its expertise or advice. Nor would Timmis be paid if Guardian acquired a business that Timmis did not contact, even if Timmis also provided expertise and advice. In fact, Timmis could earn its fee without providing any expert advice or information to Guardian, simply by identifying and contacting a potential acquisition for Guardian.

Since the alleged agreement results in compensation for Timmis only if it contacts a target that Guardian subsequently acquires, it is indistinguishable from the agreement in Cardillo, which provided as follows:

> The terms of the oral agreement were that if plaintiffs found a buyer and the purchase transaction closed, they would receive a fee of 8% of the first $1 million of the sale price and 5% of the balance of the purchase price which exceeded $1 million. 145 Mich App at 364.

Other than the fact that the plaintiffs in Cardillo were working for the seller, and not the buyer, both contracts were essentially "finder's fee" agreements. Compensation to the finder was triggered by a successful acquisition or sale by or to the finder's client. In the Timmis agreement, Timmis had the additional obligation of making personal contact with the target.

In Cardillo, the trial court had held that a "finder" was not a real estate broker under the Act. Id at 365. As previously stated, the Court of Appeals reversed that decision and expressly held that a person who is paid to find a purchaser or seller is subject to the licensing requirements of the Act. Id at 368-371. The same statute applies to Timmis' alleged agreement. Since Timmis' compensation is dependent on finding a business for Guardian to acquire, that activity requires a real estate broker's license.

Timmis' attempt to separate its investment banking services from the terms of the alleged agreement is unavailing. This Court recently rejected a similar argument made in the context of the closely-related Residential Builders Licensing Act, MCLA 339.2401 et seq.

In Stokes v Millen Roofing Co, 466 Mich 660; 649 NW2d 371 (2002), an unlicensed builder brought an action to recover payment for the value of the labor and materials furnished to a residential home. Among other arguments, the builder claimed that even if its labor was

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unrecoverable because of the lack of a license, the value of the materials could be recovered because a supplier of materials does not have to be licensed. Id at 666.

Justice Kelly rejected the builder's argument for compensation:

> The fact that Millen was not required to be licensed to supply slate is of no consequence here. In order for the "supplier" portion of this contract to be enforced, it would have to be severed from the illegal portions of the agreement. As the dissent points out, for that to occur, the illegal provision must not be central to the parties' agreement. See 2 Restatement Contracts, §603, pp 1119-1120.
>
> > [I]f the agreements are interdependent and the parties would not have entered into one in the absence of the other, the contract will be regarded. . . as entire and not divisible. [3 Williston, Contracts (3d ed), §532, p 765.]
>
> Hence, the contract can be bifurcated only if the agreement to install the material is independent of the agreement to supply them. But, here the agreements were not independent of one another. Applying the test formulated by the dissent, it becomes apparent that the illegal section, which provided for the installation of a slate roof, was central to the parties' agreement. The parties' contract required Millen to "furnish and install" the roofing components and did not specify the portion of the total cost attributable solely to materials. If the parties had not intended Millen to install the roof, the Stokes would have had the installer they selected deliver the slate. It follows that the contract is entire and indivisible.
>
> **Even if, normally, the contract could be bifurcated, the statute prohibits it. Section 2412 bars a suit for compensation if a license was necessary for performance of "an act or contract". The statute requires us to look for either an act or a contract requiring a license. It does not make provision for bifurcating building contracts into separate labor and supply components. Accordingly, it is irrelevant that Millen could have supplied slate without a license. Millen's counterclaim was properly disallowed.** (Footnote omitted) (Emphasis supplied). Id at 666-667.

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The foregoing analysis applies to Timmis' contract as well. Timmis characterizes its activities as investment banking services, which it asserts do not require a real estate broker's license. However, the specific activity which triggers Timmis' claim for compensation, i.e., the identification of and contact with an acquisition target, unquestionably requires a broker's license under Cardillo. The alleged agreement does not distinguish between payment for investment banking services and a finder's fee. As previously noted, the fee is only payable under the illegal portion of the agreement. As in Stokes, Timmis cannot bifurcate its investment banking activities, which do not trigger a right to compensation under the agreement, from its broker activities, for which compensation is sought.

In addition, the prohibition in MCLA 339.2412 of the builders act is nearly identical to the prohibition in MCLA 339.2512a, which was previously reproduced on page 8 of this brief:

> A person or qualifying officer for a corporation or member of a residential builder or residential maintenance and alteration contractor shall not bring or maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article during the performance of the act or contract.

Both statutory bars apply to "an act or contract". As Justice Kelly noted in Stokes, the statute requires this Court to look for either an act or contract requiring a license and to apply the bar if the compensation is based on either. Id at 667. Timmis' compensation claim is based on its performance of the alleged agreement. That agreement required Timmis to procure and contact a target for Guardian. Under Cardillo, finding a seller or purchaser of a business is one of the usual functions of a broker, and subjects the finder to the licensing requirements. 145 Mich App at 368.

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Therefore, Stokes requires that Timmis be licensed based on both its activities and its contract, even if Timmis only procured and contacted the seller as part of its investment banking services.

e. There is no issue of fact as to whether Timmis negotiated for the purchase of a business on behalf of Guardian.

Even if Cardillo's interpretation of the Act is determined to be too broad, Timmis failed in the trial court to raise an issue of fact as to whether it had engaged in negotiations for the purchase of a business.

Guardian supported its motion under MCR 2.116(C)(10) with a letter dated February 26, 1997, that Timmis' attorney, John J. Walsh, wrote to Guardian demanding payment under the alleged oral agreement as a result of Guardian's purchase of MetroCell Security (78a). Mr. Walsh wrote as follows:

> Based upon your agreement with Timmis on behalf of Guardian, **Timmis, in good faith, represented Guardian in negotiations with The Rao Corporation for the purchase of MetroCell Security** over a period of several weeks, during which Mr. Gerald Timmis spoke with you regarding specifics such as pricing, strategy and status. At all times following Guardian's agreement to retain Timmis in connection with the purchase of MetroCell, **Mr. Timmis represented himself and performed as Guardian's agent with specifically granted authority and without any objection from Guardian**. (Emphasis added).

There is no doubt that in addition to selecting MetroCell Security as the target company, Timmis actually engaged in **negotiations** with The Rao Group on behalf of Guardian. The Walsh letter contains that admission. This would be expected, since Timmis already had a business relationship with The Rao Group. Timmis listed The Rao Group as one of its clients in its brochure (51a).

Furthermore, Timmis would not be acting as Guardian's agent with Guardian's permission, if it was not negotiating for the purchase.

Gerald Timmis' personal involvement in the negotiations is further confirmed in his affidavit at paragraph 26 wherein he states:

> The agreement between G.C. Timmis & Company and Guardian Alarm Company specified that a success fee would be paid on any target **that I contacted** on Guardian's behalf that was eventually acquired; (Emphasis added) (38a).

Since the alleged agreement was oral, Timmis' admission that his personal contact with the target was an essential part of the agreement is crucial. Obviously, Timmis would not be entitled to receive a success fee unless it had direct contact with the target.

At the hearing on Guardian's Motion for Summary Disposition, the trial court mentioned twice that Guardian's motion was not supported with documentary evidence to establish Timmis' activities in performing the alleged agreement (14a, 16a). However, as Guardian reminded the trial court, it had attached the letter of February 26, 1997 as an exhibit to its motion (16a).

MCR 2.116(G)(3) permits the moving party to support its motion for summary disposition under (C)(10) with "affidavits, depositions, admissions *or other documentary evidence*". The letter of February 26, 1997, coming from Timmis' attorney at the time, constitutes an admission by Timmis. Owen v Birmingham Federal Savings & Loan Association, 27 Mich App 148; 183 NW2d 403 (1970) (admissions by party's representative are admissible); Weber v Enoch C Roberts Iron Ore Co, 270 Mich 38; 258 NW 408 (1935) (client bound by factual concession of his attorney).

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There is no question Guardian properly supported its motion for summary disposition with an admission and documentary evidence. The letter of February 26, 1997 constitutes sufficient support for the motion under MCR 2.116 (G)(3).

It is ironic that the trial court and Timmis criticized the supposed lack of evidentiary support for Guardian's motion. In reality, it was Timmis that failed to support its response to the motion and failed to create an issue of fact as to the nature of the services provided to Guardian.

Included in Plaintiff-Appellant's Appendix is a document that purports to be the affidavit filed by Timmis in opposition to Guardian's Motion for Summary Disposition (34a-53a). In fact, that document is not the affidavit that was filed in response to the Motion for Summary Disposition. The document that was actually filed is contained in Defendant-Appellee's Appendix (1b). This document is unexecuted, as was the copy served on Guardian's counsel in response to the Motion for Summary Disposition. When Guardian attempted to obtain a copy of the original affidavit, presumably executed and notarized, there was no such document in the circuit court file. In fact, no affidavit filed in opposition to Guardian's motion appears on the trial court's docket sheet that was filed as part of Guardian's Application for Leave to Appeal on April 14, 1998 (8b).

One month to the day after Guardian filed its Application, Timmis filed in the trial court a copy of the affidavit used to support its response to the Motion for Summary Disposition. The affidavit is executed and notarized on May 14, 1998. The copy of the affidavit filed with the court nearly two months after it was referenced in oral argument is the one in Appellant's Appendix (34a-53a) Clearly, the affidavit dated May 14, 1998 could not have supported the response to the Motion for Summary Disposition that was argued on March 25, 1998.

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An affidavit must be verified by oath or affirmation. MCR 2.113(A). The "affidavit" actually filed by Timmis in support of its response was not even *executed*, let alone verified. Nor does the "affidavit" comport with the requirements of MCR 2.119(B). This rule requires all affidavits in opposition to a motion to:

> (a) be made on personal knowledge; and
>
> * * * * * * *
>
> (c) show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit.

Timmis' "affidavit" contains neither required statement (34a-53a).

Timmis was required to make a specific showing, by affidavit or otherwise, that there is a genuine issue for trial. MCR 2.116(G)(4); Smith, supra at 454-455. By failing to submit a legally sufficient affidavit in opposition to the motion, Timmis failed to meet its burden. The trial court erred when it ruled that the "affidavit" filed by Timmis created an issue of fact (14a-16a). As stated in MCR 2.116(G)(4), if the adverse party does not respond with documentary evidence, judgment shall be entered against him or her. The trial court should have entered judgment for Guardian on the basis that Timmis failed to create an issue of fact. On appeal, the Court of Appeals held that Timmis failed to present documentary evidence establishing the existence of a genuine issue of material fact as to whether its conduct fell within the scope of the Act (28a).

Furthermore, even if Timmis' "affidavit" constituted proper evidence, **Timmis never denied it had conducted negotiations on behalf of Guardian with The Rao Group**. Timmis devoted most of its response and affidavit to asserting that what it provided to Guardian was investment banking services (40a). That is a conclusion, not a fact, and is insufficient to establish a genuine

issue of material fact to preclude summary dismissal. Bowerman v Malloy Lithographing, Inc, 171 Mich App 110; 430 NW2d 742 (1988).

Once Guardian met its initial burden of supporting its Motion for Summary Disposition with the Walsh letter, Timmis was required to present documentary evidence establishing the existence of a material factual dispute. Timmis relied exclusively on the "affidavit" (34a). Incredibly, Timmis never denied in the affidavit that he engaged in negotiations with The Rao Group or that the Walsh letter was factually inaccurate. Those arguments were later raised by counsel in argument and were not verified by Gerald Timmis.

In paragraph 32 of the "affidavit", Timmis makes the following admission:

> 32. Although there were extensive negotiations between GUARDIAN ALARM and MetroCell Security, the two parties were not able to agree on a purchase price, at which time I instructed Mr. Pierce to "let things percolate" and allow sufficient time to determine whether an agreement could be reached; (39a).

Timmis noticeably fails to identify the person that conducted the negotiations on behalf of Guardian. Yet, Guardian had supported its motion with the Walsh letter which clearly states that Timmis negotiated with The Rao Group on Guardian's behalf (78a). Timmis' failure to deny the accuracy of the Walsh letter's admissions speaks louder than his carefully phrased "affidavit". Under the Smith standard, the affidavit failed to raise an issue of fact as to whether Timmis negotiated the purchase, as the Court of Appeals properly held (28a).

In both the Court of Appeals and in this Court, Timmis has attempted to create an issue of fact as to its activities by referring to statements in a Joint Final Pretrial Order (54a-60a) and in depositions (61a-69a) that were made subsequent to the hearing on the Motion for Summary

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Disposition. Timmis also relies on a Motion in Limine regarding the Walsh letter which was filed in the trial court after the Motion for Summary Disposition was denied, but was never argued (70a-79a). The evidence Timmis tries to present was never presented to the trial court and was not part of the record on appeal. It does not appear that this supplemental evidence was considered by the Court of Appeals, although the dissenting opinion mentions the fact that certain evidence exists which was not presented to the trial court (31a).

MCR 7.311(A) describes the record on appeal in the Supreme Court:

> **Transmission of Record**. An appeal is heard on the original papers, which constitute the record on appeal. When requested by the Supreme Court clerk, the Court of Appeals clerk or the lower court clerk shall send to the Supreme Court clerk all papers on file in the Court of Appeals or the lower court, certified by the clerk. For an appeal originating from an administrative board, office, or tribunal, the record on appeal is the certified record filed with the Court of Appeals clerk and the papers filed with the Court of Appeals clerk.

The appeal in this case is from the trial court's Order Denying Motion for Summary Disposition entered on March 26, 1998 (20a). Therefore, the record on appeal consists only of the original papers, pleadings and exhibits that were filed with the trial court prior to March 26, 1998 and which were available for the court's consideration on the Motion for Summary Disposition. MCR 7.210(A)(1). The Joint Final Pretrial Order, deposition testimony, and Motion in Limine were never presented to the trial court and are not part of the record on appeal. Golden v Baghdoian, 222 Mich App 220, 222; 564 NW2d 505 (1997).

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Guardian has filed a Motion to Strike pages 54a through 77a from Plaintiff-Appellant's Appendix as well as all references to those exhibits from Plaintiff-Appellant's Brief and they will not be discussed herein.[4]

f. An agreement to provide investment banking services can be subject to the Real Estate Brokers Licensing Act.

In her dissenting opinion, Judge White would not equate the finding of a buyer for identified property with the rendering of advice and the identification of business opportunities (32a). While there is no question that an investment banker can perform services that do not qualify as a real estate brokers services, it is just as certain that an investment banker can perform an act that would require a brokers' license. The distinction between the two kinds of agreements is illustrated by comparing the agreement at issue in Turner Holdings, Inc v Howard Miller Clock Co, supra with the Timmis agreement.

Plaintiff Turner, an investment banker entered into a written agreement to provide certain services. A copy of that written agreement was appended to the court's opinion and is included in Defendant-Appellee's Appendix (11b). Turner agreed to identify potential acquisition targets, contact those companies for financial information, pursue those companies, and develop follow-up strategies. In addition, the agreement expressly stated that there would be no distinction in the "success fee" between companies suggested by Turner and those suggested by the client. Finally, the client was under no obligation to negotiate with any company introduced to it by Turner.

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[4]To the extent that Guardian's Motion to Strike is denied, Guardian has requested in the alternative, the opportunity to supplement its brief and appendix with parts of the depositions of Gerald Timmis and Duane Rao, which unequivocally establish Timmis' participation in the negotiations for the purchase.

By comparison, the Timmis agreement was not reduced to writing, which in itself would appear to be incongruous with the sophisticated nature of the alleged services to be provided. Furthermore, the only activity that Timmis agreed to perform was to contact a potential acquisition target (38a). There was no provision for the reimbursement of expenses and Timmis would only be paid if its identified target was acquired by Guardian.

The court in Turner distinguished many of the Michigan cases cited in this brief. The court stated that Krause and its progeny involved real estate interests. 657 F Supp at 1376. While noting that the Act does apply to negotiations for the sale of a business, the Court held that Turner was not engaged in negotiations. The parties had stipulated that Turner did not select the company acquired nor had Turner negotiated with that company. Id at 1377. Turner's expert had testified that the investment banker is not normally part of the negotiating team. Id at 1376-1377.

The court also distinguished Cardillo on the basis that the plaintiff in Cardillo was hired to find a buyer for the business, while Turner was hired to provide advice, expertise and analysis. Id at 1377. The court specifically found that the work to be performed under the written contract was not covered by the Act. Id at 1378.

The Court of Appeals did not find Turner to be persuasive with regard to the Timmis agreement. Although the Court of Appeals recognized that it was not bound by federal cases interpreting Michigan law,[5] Turner is easily distinguished from Timmis on the facts of the case (28a).

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[5]Ryder Truck Rental, Inc v Auto-Owners Insurance Co, Inc, 235 Mich App 411; 597 NW2d 560 (1999).

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Turner involved a written contract, with clearly defined tasks, involving the expertise and advice of an investment banker. It was not a "finder's fee" agreement, nor did it require Turner to negotiate the acquisition. Most importantly, it was stipulated that Turner did not negotiate the acquisition nor select the target.

On the other hand, Timmis' agreement required only that it identify and contact the target. While it is possible, and perhaps likely, that Timmis also provided expert opinion and advice, that was not alleged to be part of the agreement. Timmis' agreement more closely resembles the "finder's fee" agreement in Cardillo than it does the written contract in Turner. When coupled with the admissions made in the Walsh letter regarding negotiations, the Court of Appeals had no difficulty in distinguishing Turner.

An investment banker possesses the skill and knowledge to perform tasks that a typical real estate broker might not be able to address. However, that does not mean that an investment banker cannot be deemed to be acting as a real estate broker when it performs an act or contract which requires a license.

The situation is no different than if Timmis decided to provide legal advice as part of its investment banking services. There is no question that had Timmis engaged in acts that constituted the practice of law, in the guise of providing investment banking services, it would have been required to have a license to practice law. MCLA 600.916; Matter of Bright, 171 BR 799 (ED Mich, 1994).

The drafters of the Real Estate Brokers Licensing Act considered that certain occupations might involve the performance of acts that could require a license. In its wisdom, the legislature did

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exempt certain professions from the licensing requirements of the statute. MCLA 339.2503 states in part as follows:

> (2) This article shall not include the services rendered by an attorney at law as an attorney at law, nor shall it include a receiver, trustee in bankruptcy, administrator, executor, a person selling real estate under order of a court, nor a trustee selling under a deed of trust. This exemption of a trustee shall not apply to repeated or successive sales of real estate by the trustee, unless the sale is made through a licensed real estate broker.
>
> (3) This article does not apply to a person who is regulated under the mortgage brokers, lenders, and servicers licensing act, Act No. 173 of the Public Acts of 1987, being sections 445.1651 to 445.1683 of the Michigan Complied Laws, and who does not perform any other act requiring a license as a real estate broker, associate broker, or real estate salesperson.

The Court of Appeals has held on numerous occasions that the express mention of one thing in a statute implies the exclusion of other similar things. Saginaw General Hospital v City of Saginaw, 208 Mich App 595; 528 NW2d 805 (1995). By listing attorneys and mortgage brokers as occupations exempt from the licensing requirements, the legislature is presumed to have intentionally not exempted investment bankers, as the Court of Appeals noted (28a).

This Court has addressed whether an attorney who provided brokerage services was exempt under MCLA 339.2503(2) from the licensing requirements. In Krause v Boraks, supra, this Court reached the following conclusion:

> There is no doubt that the legal aspects of real estate transactions may constitute a large portion of an average attorney's practice, and thus are inseparably connected with the practice of law. But an attorney engaging *solely* in the function of obtaining a prospective purchaser for an interest in realty, in conjunction with a broker, is clearly invading another scope of activity which, in the absence of being licensed so to do, is prohibited by statute. **That an attorney is well**

> **qualified to engage in such endeavor cannot be denied. However, the legislature has clearly intended that one engaging in that field of activity must be licensed. Plaintiff's services were not within the exemption provision of the statute hereinbefore quoted.** As between Krause and Brooks the claimed contract must, as a matter of law, be held void under the rules stated in *Jaenicke v. Davidson*, 290 Mich 298, where it is said:
>
> > All contracts which are founded on an act prohibited by a statute under a penalty are void although not expressly declared to be so and neither law nor equity will enforce a contract made in violation of such a statute or one that is in violate of public policy. (Emphasis added.) Id at 154-155.

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In the case at bar, Timmis may have also provided investment banking services to Guardian. However, its alleged agreement makes no mention of those services. Furthermore, there is no exemption for investment bankers as there is for attorneys. Thus, it is irrelevant whether Timmis was *also* providing investment banking services. As stated in Krause, if the agreement is founded on an act which requires a license, the agreement is void if the performer does not have the required license.

Investment bankers are not licensed nor registered as such by the state. They may perform certain services which require a license from the state. For example, Timmis is a registered "broker-dealer" because it engages in the business of effecting transactions in securities or commodities contracts (35a); MCLA 451.801(c). Timmis is a registered "investment advisor" because it engages in the business of advising others as to the value of securities or commodity contracts for a consideration (35a); MCLA 451.801(f).

Timmis is free to characterize its agreement as providing investment banking services, but that does not provide Timmis with an exemption from the licensing requirements of the Act. When

Timmis only agreed to find an acquisition target for Guardian, it fell squarely within Cardillo, and when Timmis admitted that it negotiated with The Rao Group, its conduct was factually distinguishable from Turner.

g. Timmis' reliance on case law from other jurisdictions does not compel a different result.

Timmis argues that the Appellate Division of the Supreme Court of New York in Eaton Associates v Highland Broadcasting Corp, 81 AD2d 603; 437 NYS2d 715 (1981) held that a financial consultant's services fell outside of New York's Real Estate Brokers licensing statute. In fact, the New York statute defines a real estate broker as including a person who negotiates a loan secured by a mortgage upon real estate. Id at 716. The plaintiff had prepared a financial plan for its client which the client presented to lenders to obtain a loan. The court held that the mortgages were an "incidental" feature of the plaintiff's responsibilities and did not constitute brokerage services. Id at 716.

Eaton's holding is directly contrary to this Court's decision in Stokes. Eaton attempts to bifurcate the "incidental real estate services" from the financial planning aspect of the agreement. As this Court held in Stokes, that type of bifurcation of an illegal part of the contract from the legal part is not permissible. 466 Mich at 617.

Timmis' reliance on Zappas v King Williams Press, Inc, 10 Cal App 3d 768; 89 Cal Rptr 307 (1970) is equally misplaced. In Zappas, the court followed established California precedent holding

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that a person who simply acts as a "finder" need not be licensed as a broker. However, a person who negotiates for the sale of real estate must be licensed.[6]

Zappas is totally at odds with the Cardillo decision in which the Court of Appeals expressly held that there is no "finders' fee" exception to the licensing Act. Zappas represents the minority view, which the Court of Appeals expressly declined to adopt in Michigan. 145 Mich App at 371.

Finally, the case of Legros v Tan, 540 NE2d 257 (Ohio, 1989), does not even involve a brokers' licensing statute. Timmis quotes the court's lengthy discussion of the difference between investment brokers and business opportunity finders. The subtle differences between the two are not relevant in Michigan because according to the definitions of the Ohio Supreme Court, an investment broker and a business finder would both be required to be licensed under Michigan's statute if either procured a purchaser or seller for a business. 540 NE2d at 262.

h. Equitable considerations cannot avoid the application of the statutory bar.

Court are often concerned over the harshness of applying the prohibition of the statute when it appears that the unlicensed party had earned its fee through performance of the agreement. In the case at bar, Guardian has hotly contested the existence of any agreement with Timmis from the beginning of the lawsuit. The lack of a written agreement to provide investment banking services lends support to Guardian's denials.

This Court recently held in Stokes, supra, that a lower court cannot provide for equitable remedies to avoid unduly harsh legal doctrines. As Justice Kelly wrote in her majority opinion:

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[6]Shaffer v Beinhorn, 190 Cal 569, 574; 213 P 960 (1923).

Courts must be careful not to usurp the Legislative role under the guise of equity because a statutory penalty is excessively punitive. As the Court of Appeals stated:

> Regardless of how unjust the statutory penalty might seem to this Court, it is not our place to create an equitable remedy for a hardship created by an unambiguous, validly enacted, legislative decree. [245 Mich App 57-58].

Moreover, as was stated in *Bilt-More Homes, Inc. v French*, 373 Mich 693, 699; 130 NW2d 907 (1964):

> Contracts by a residential builder not duly licensed are not only voidable but void -- and it is not for a trial court to begin the process of attrition whereby, in appealing cases, the statutory bite is made more gentle, until eventually the statute is made practically innocuous and the teeth of the strong legislative policy effectively pulled. If cases of such strong equities eventually arise that the statute does more harm than good the legislature may amend it. . .

(Footnotes omitted) 466 Mich at 671-672.

There is plenty of doubt as to whether Timmis actually entered into the agreement with Guardian on which its lawsuit was brought. However, there is no doubt that if the agreement was made as alleged, Timmis was required to have a real estate brokers license, in order to maintain an action for compensation under that agreement. That requirement is one that cannot be avoided or diminished by equitable considerations.

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Relief Requested

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Respectfully submitted,

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